

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WENDY DALLYN SNOOK,)
) No. CV-10-269-JPH
Plaintiff,)
) ORDER GRANTING PLAINTIFF'S
v.) MOTION FOR SUMMARY JUDGMENT
) AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE, Commissioner) PROCEEDINGS
of Social Security,)
) (ECF No. 13)
Defendant.)
)
)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on August 26, 2011 (ECF No. 13, 17). Attorney Donald C. Bell represents plaintiff; Special Assistant United States Attorney David R. Johnson represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (ECF No. 7). On June 9, 2011, plaintiff filed a reply (ECF No. 21). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** plaintiff's motion for summary judgment (**Ct. Rec. 13**) and **REVERSES AND REMANDS** pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings. The court **DENIES** defendant's motion for summary judgment (**ECF No. 17**).

JURISDICTION

Plaintiff applied for disability insurance benefits (DIB) on

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1 December 17, 2007, alleging disability since February 1, 2000, due
2 to memory loss, carpal tunnel syndrome, diabetes, bladder
3 dysfunction, eye problems and a thyroid condition (Tr. 89-91,
4 103). Her applications were denied initially and on
5 reconsideration (Tr. 49-51, 53-54).

6 Administrative Law Judge (ALJ) Benita A. Lobo held a hearing
7 November 5, 2009 (Tr. 23-46). Plaintiff, represented by counsel,
8 and a vocational expert testified. On December 15, 2009, the ALJ
9 issued an unfavorable decision (Tr. 9-15). The Appeals Council
10 denied review on July 28, 2010 (Tr. 1-3).

11 The ALJ's decision became the final decision of the
12 Commissioner, which is appealable to the district court pursuant
13 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
14 review pursuant to 42 U.S.C. § 405(g) on August 19, 2010 (ECF No.
15 1, 4).

16 **STATEMENT OF FACTS**

17 The facts have been presented in the administrative hearing
18 transcripts, the ALJ's decision, the briefs of both parties, and
19 are briefly summarized here.

20 Ms. Snook was 48 years old on her last insured date and 53 at
21 the hearing (Tr. 25, 89). She has a bachelor's degree in nursing
22 and worked as a school nurse. She has also worked as a maid,
23 landscaper, bakery worker, and at the Census Department (Tr. 26-
24 27, 35). Plaintiff lives with her spouse. She testified she cannot
25 work due to memory problems (Tr. 28).

26 **SEQUENTIAL EVALUATION PROCESS**

27 The Social Security Act (the Act) defines disability as the

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1 "inability to engage in any substantial gainful activity by reason
2 of any medically determinable physical or mental impairment which
3 can be expected to result in death or which has lasted or can be
4 expected to last for a continuous period of not less than twelve
5 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
6 provides that a Plaintiff shall be determined to be under a
7 disability only if any impairments are of such severity that a
8 plaintiff is not only unable to do previous work but cannot,
9 considering plaintiff's age, education and work experiences,
10 engage in any other substantial gainful work which exists in the
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
12 the definition of disability consists of both medical and
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
14 (9th Cir. 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled.
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
18 is engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
20 the decision maker proceeds to step two, which determines whether
21 plaintiff has a medically severe impairment or combination of
22 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

23 If plaintiff does not have a severe impairment or combination
24 of impairments, the disability claim is denied. If the impairment
25 is severe, the evaluation proceeds to the third step, which
26 compares plaintiff's impairment with a number of listed
27 impairments acknowledged by the Commissioner to be so severe as to

1 preclude substantial gainful activity. 20 C.F.R. §§
2 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
3 App. 1. If the impairment meets or equals one of the listed
4 impairments, plaintiff is conclusively presumed to be disabled. If
5 the impairment is not one conclusively presumed to be disabling,
6 the evaluation proceeds to the fourth step, which determines
7 whether the impairment prevents plaintiff from performing work
8 which was performed in the past. If a plaintiff is able to perform
9 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
10 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
11 residual functional capacity (RFC) assessment is considered. If
12 plaintiff cannot perform this work, the fifth and final step in
13 the process determines whether plaintiff is able to perform other
14 work in the national economy in view of plaintiff's residual
15 functional capacity, age, education and past work experience. 20
16 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
17 482 U.S. 137 (1987).

18 The initial burden of proof rests upon plaintiff to establish
19 a *prima facie* case of entitlement to disability benefits.
20 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
21 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
22 met once plaintiff establishes that a physical or mental
23 impairment prevents the performance of previous work. The burden
24 then shifts, at step five, to the Commissioner to show that (1)
25 plaintiff can perform other substantial gainful activity and (2) a
26 "significant number of jobs exist in the national economy" which
27 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th

1 Cir. 1984).

2 **STANDARD OF REVIEW**

3 Congress has provided a limited scope of judicial review of a
4 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
5 the Commissioner's decision, made through an ALJ, when the
6 determination is not based on legal error and is supported by
7 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
8 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
9 "The [Commissioner's] determination that a plaintiff is not
10 disabled will be upheld if the findings of fact are supported by
11 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
12 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
13 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
14 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
15 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
16 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
17 573, 576 (9th Cir. 1988). Substantial evidence "means such
18 evidence as a reasonable mind might accept as adequate to support
19 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
20 (citations omitted). "[S]uch inferences and conclusions as the
21 [Commissioner] may reasonably draw from the evidence" will also be
22 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
23 review, the Court considers the record as a whole, not just the
24 evidence supporting the decision of the Commissioner. *Weetman v.*
25 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
26 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

27 It is the role of the trier of fact, not this Court, to

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1 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
2 evidence supports more than one rational interpretation, the Court
3 may not substitute its judgment for that of the Commissioner.
4 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
5 (9th Cir. 1984). Nevertheless, a decision supported by substantial
6 evidence will still be set aside if the proper legal standards
7 were not applied in weighing the evidence and making the decision.
8 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
9 433 (9th Cir. 1987). Thus, if there is substantial evidence to
10 support the administrative findings, or if there is conflicting
11 evidence that will support a finding of either disability or
12 nondisability, the finding of the Commissioner is conclusive.
13 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

14 **ALJ'S FINDINGS**

15 At step one the ALJ found plaintiff did not engage in
16 substantial gainful activity between onset on February 1, 2000,
17 and the date her insurance expired, December 31, 2004 (Tr. 11). At
18 steps two and three, ALJ Lobo found plaintiff suffers from type I
19 insulin dependent diabetes mellitus, a severe impairment that does
20 not meet or medically equal a Listed impairment (Tr. 11-12). She
21 found plaintiff less than completely credible (Tr. 14). At step
22 four the ALJ found plaintiff is able to perform her past work as a
23 school nurse and as a maid (Tr. 15). Because the ALJ found
24 plaintiff could perform her past work, she is not disabled as
25 defined by the Social Security Act (Tr. 15).

26 **ISSUES**

27 Plaintiff alleges the ALJ erred when she weighed the opinions

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1 of treating and examining professionals, assessed Ms. Snook's
2 credibility, failed to discuss written lay witness and a VE's
3 statements, and failed to "conduct a proper step four assessment"
4 (ECF No. 14 at 11, 15-16, 18). The Commissioner answers the Court
5 should affirm the decision because it is supported by the evidence
6 and free of harmful error (Ct. Rec. 18 at 17, 20).

7 The third issue is determinative. The ALJ erred by rejecting
8 lay witness evidence without comment. The error is harmful and
9 therefore dispositive.

10 DISCUSSION

11 A. Lay witness evidence

12 Plaintiff alleges the ALJ failed to properly weigh statements
13 given by a lay witness, her spouse (Ct. Rec. 14 at 16-18). Ms.
14 Snook's spouse, William, submitted a report dated January 11, 2008
15 (Tr. 1117-124). The Commissioner admits the ALJ failed to discuss
16 this evidence.

17 In determining disability an ALJ must consider lay witness
18 testimony concerning a claimant's ability to work. *Bruce v.*
19 *Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009), citing *Stout v.*
20 *Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006);
21 see also 20 C.F.R. §§ 404.1513(d)(4), (e). Such testimony is
22 competent evidence and "cannot be disregarded without comment."
23 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). If an ALJ
24 disregards lay witness testimony he must provide reasons "that are
25 germane to each witness." (*Id.*). The ALJ's reasons "germane to
26 each witness" must be specific. *Stout v. Comm'r*, 454 F.3d at 1054
27 (explaining the ALJ, not the district court, is required to

1 provide specific reasons for rejecting lay testimony).

2 When Mr. Snook made his statement he lived with plaintiff and
3 had known her for 12-13 years (Tr. 117). He states plaintiff does
4 not remember to finish jobs; she is no longer able to timely pay
5 bills; sometimes needs help dressing; needs reminders to care for
6 her feet; needs grooming, insulin, and diuretic pill reminders
7 (Tr. 118-119). Low blood sugars can cause her to forget where her
8 car is parked, leave her purse somewhere, and/or become
9 disoriented. She misplaces or forgets to pay bills (Tr. 120). He
10 has seen her "get panicky when a[n] insignificant problem arose"
11 (Tr. 123). Sometimes smoke fills the kitchen and food burns (Tr.
12 119). He notes plaintiff wears a pump so she can have insulin
13 throughout the night. Mr. Snook states plaintiff has suffered with
14 diabetes most of her life, not simply at the present time (Tr.
15 124). He describes her as a person who has gone from being a
16 highly paid nurse to a person who, at age 51, helps in the garden,
17 perhaps 15 minutes to an hour a day (Tr. 119, 124). He notes a
18 general decline in activities such as memory, concentration,
19 completing tasks, understanding, and following directions (Tr.
20 122). A lot social activities "have dropped off" (*Id.*). Mr. Snook
21 is retired and spends most of his days with plaintiff (Tr. 117).

22 The Commissioner asserts because Mr. Snook's opinion "was not
23 significant or probative" the ALJ did not need to address it (ECF
24 No. 18 at 17). He argues the limitations Mr. Snook describes would
25 be relevant to plaintiff's past work as a nurse, but not to her
26 work as maid; and, because the statements do not describe her
27 condition in 2004 (her last insured date), any error by the ALJ in

1 failing to address Mr. Snook's opinion is harmless because it
2 would not change the result. The argument is flawed in at least
3 three respects.

4 First, the ALJ's error is not harmless because if the lay
5 witness's description of plaintiff's functioning is accepted as
6 true, it may support finding plaintiff disabled. Mr. Snook
7 describes limitations, which, if credited, are evidence of mental
8 limitations that may preclude all work. Forgetfulness may be as
9 limiting to a maid as to a nurse.

10 Second, the Commissioner errs by characterizing the lay
11 witness's observations as current. The witness clearly describes
12 mental decline over a period of time.

13 Last, the Commissioner errs because the ALJ in this case
14 disregarded the lay testimony *without comment*. The court is left
15 to guess why she may have rejected the opinion. In determining
16 whether a claimant is disabled, an ALJ *must* consider lay witness
17 testimony concerning a claimant's ability to work. *Bruce v.*
18 *Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009); *Stout v. Comm'r*, 454
19 F.3d 1050, 1053 (9th Cir. 2006). Such testimony is competent
20 evidence and "cannot be disregarded without comment." If an ALJ
21 disregards the testimony of a lay witness, he must provide
22 specific and germane reasons. *Bruce*, 557 F.3d at 1115, citing
23 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996); *Stout*, 454
24 F. 3d at 1054 (emphasized in *Bruce*).

25 The ALJ erred by disregarding the lay witness's statements
26 without comment. Regardless of whether they are interested
27 parties, "friends and family members in a position to observe a

1 claimant's symptoms and daily activities are competent to testify
2 as to [his or] her condition." *Valentine v. Comm'r of Soc. Sec.*
3 *Admin.*, 574 F.3d 685, 694 (9th Cir. 2009), citing *Dodrill v.*
4 *Shalala*, 12 F.3d 915, 918-919 (9th Cir. 2009).

5 The ALJ, not the district court, is required to provide
6 specific reasons for rejecting lay testimony. *Bruce*, 557 F.3d at
7 1115, citing *Stout*, 454 F.3d at 1054.

8 Plaintiff is correct. The ALJ erred by disregarding Mr.
9 Snook's statements without comment. And the error is harmful.
10 Because this issue is dispositive the court grants plaintiff's
11 motion and orders the matter remanded for further administrative
12 proceedings.

13 On remand the ALJ may wish to utilize the services of a
14 testifying psychologist to clarify whether plaintiff suffers from
15 a severe mental impairment as defined by the Act.

16 In addition, on remand the ALJ should clarify the step four
17 finding. At page 15, the ALJ found plaintiff was capable of
18 performing her past relevant work as a school nurse and as a maid.
19 At page 14, the ALJ states "While the claimant was unable to
20 perform her past duties as a nurse during the period mentioned,
21 there is no evidence that she was precluded from all work
22 activities." The inconsistency should be clarified on remand.

23 It is the role of the trier of fact, not this Court, to
24 resolve conflicts in evidence. *Richardson v. Perales*, 402 U.S.
25 389, 400 (1971). A decision supported by substantial evidence
26 will be set aside if the proper legal standards were not applied
27 in weighing the evidence and making the decision. *Browner v.*

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1 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th
2 Cir. 1987)).

3 The court wishes to make clear it expresses no opinion as to
4 what the ultimate outcome on remand will or should be. The
5 Commissioner is free to give whatever weight to the lay evidence
6 she deems appropriate. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th
7 Cir 1982)("[Q]uestions of credibility and resolution of conflicts
8 in the testimony are functions solely of the Secretary.")

9 **CONCLUSION**

10 Having reviewed the record and the ALJ's conclusions, this
11 Court finds the ALJ's decision contains harmful legal error
12 requiring remand for additional proceedings. .

13 **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
15 **GRANTED**. The decision is **REVERSED** and **REMANDED** pursuant to
16 **sentence four** for further administrative proceedings.

17 2. Defendant's Motion for Summary Judgment (**ECF No. 17**) is
18 **DENIED**.

19 3. An application for fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order,
21 provide copies to counsel for Plaintiff and Defendant, enter
22 judgment in favor of Plaintiff, and **CLOSE** this file.

23 DATED this 18th day of July, 2011.

24
25 s/ James P. Hutton

26 JAMES P. HUTTON
27 UNITED STATES MAGISTRATE JUDGE

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